Office - Supreme Court, U.S.
FILED
NOV 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-76

In the

Supreme Court of the United States

October Term, 1981

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW L. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari and Appendix

ROBERT ABRAMS
Attorney General of the State of New York, Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 474-7173

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions
JEREMIAH JOCHNOWITZ
Assistant Solicitor General
BETSY BRODER
Deputy Assistant Attorney General
Of Counsel
Dated: July 26, 1982

Questions Involved.

1. Whether an administrative determination as opposed to a judicial determination, by the New York Court of Appeals, which could have been reviewed in New York State Courts by an Article 78 proceeding or in action seeking a declaratory judgment, is reviewable by the Supreme Court?

2. Whether the Court of Appeals would be estopped from denying petitioner's application for admission to New York State bar because it had allegedly granted similar applications by others and the petitioner relied on them?

3. Whether the petitioner may extend the 90-day period in which he has to apply for a writ of certiorari by requesting reconsideration of a determination by the Court of Appeals where there is no provision for such reconsideration?

Table of Contents.

	Page
Questions Involved	i
Statement	1
Table of Contents	ii
Facts	2
Federal Statutes and State Statutes Involved	6
ARGUMENT:	
I. Since the Court of Appeals in denying petitioner's application for admission was acting not in a judicial capacity but in an administrative capacity, this application is premature	10
II. The alleged instances where admission was granted to other persons under similar circumstances do not estop the Court of Appeals from denying petitioner's application	15
III. The application for certiorari is late	17
CONCLUSION. The petition for writ of certiorari should be denied	18

Index to Appendix.

	Page
Complaint	A1
Answer	A10
Affidavit of Hon. Hugh R. Jones	A13

TABLE OF AUTHORITIES.

CASES:

Bloomberg-Dubin, Matter of v. Board of Educ., of the City of New York, *et al.*, 82 AD 2d 854, affd 56 NY2d 555 (1982)	16
Fleming v. New York Court of Appeals, 450 US 902 (1981)	13
FTC v. Minneapolis-Honeywell Regulator Co., 344 US 206, 210-12 (1952)	17
Gordon v. Committee on Character and Fitness, 48 NY2d 266 (1980)	14
Hamptons Hosp. & Med. Center, Matter of v. Moore, 52 NY2d 88 (1981)	16
King, Governor of Massachusetts, *et al.*, v. Preterm, Inc., *et al.*, 448 US 901 (1980)	17
Morganthau v. Cooke, Chief Judge of the Unified Court System of the State of New York, *et al.*, 56 NY2d 24 (1982)	14
Pirie, Matter of, 64 AD2d 110 (1st Dept, 1978)	14

Page

Public Improvements, Inc. v. Board of Education of the City of New York, 56 NY2d ____ (decided June 8, 1982)..... 16

Schweiker v. Hansen, 450 US 785 (1981)..... 16

United States Immigration and Naturalization Services v. Hibi, 414 US 5 (1973)..... 16

STATUTES CITED:

United States Statutes:

28 USC 1257..... 6

New York Constitution:

Article VI, §§ 2 and 3..... 10

Article VI, § 28..... 10

New York Statutes:

New York Judiciary Law, Article 7-A..... 11

New York Judiciary Law, § 90(10)..... 9, 16

New York Rules and Regulations:

CPLR, Article 78..... 13

CPLR, § 1026..... 7

CPLR, § 7801..... 7

CPLR, § 7802(a)..... 8

Page

CPLR, § 7803 8

22 NYCRR 510.9(a)(2) 2

Rule 520.9(a)(1) 11

Rule 520.12 11

Rule 5909(a)(1)(a) 2

MISCELLANEOUS:

31 CJS, § 69, p 416 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

No. 82-76

PHILIP S. SHAPIRO,

Petitioner,

against

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW I. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

Brief in Opposition to Petition For a Writ of Certiorari.

Statement.

The respondent submits this brief in opposition to Philip S. Shapiro's petition for a writ of certiorari to review an administrative determination of the New York State Court of Appeals denying petitioner's application

for a waiver of compliance with the practice requirements under 22 NYCRR 520.9(a)(2) on the grounds that employment in New York State by the Consumer Protection Board as an intervenor attorney is not actual practice in the contemplation of Rule 5909(a)(1)(a).

Facts.

Petitioner was a cititzen of Maryland and was admitted to practice before the Maryland bar on December 30, 1976. He practiced in Maryland until January 1980 when he moved to New York State and entered the employ of the Utility Intervention Unit of the State's Consumer Protection Board, a New York Agency. In 1982, petitioner applied for admission to the New York State bar based on the three years' practice in Maryland and two years in which he worked in New York for the Utility Intervention Unit of the State's Consumer Protection Board.

Petitioner was advised of the Court of Appeals' denial of his application by letter written by Joseph W. Bellacosa, Clerk of the Court, dated March 23, 1982. This letter reads as follows (Pet Appendix, A2):

"COURT OF APPEALS
STATE OF NEW YORK

Philip S. Shapiro
47 Peyster Street
Albany, New York 12208

In the Matter of the Application of Philip S. Shapiro for waiver of strict compliance with the practice requirements of 22 NYCRR 520.9(a) (2).

March 23, 1982

Dear Mr. Shapiro:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding has been denied.

While the Court does not issue opinions or reasons in these matters, it is pertinent to note that in the Court's review and determination, it has concluded that your petition does not establish the required substantial compliance with Rule 520.9(a) (2), so as to qualify you for a waiver pursuant to Rule 520.12. In particular, your petition did not establish five years practice of law. Employment in New York State by the Consumer Protection Board as an Intervenor Attorney is not actual practice in the contemplation of Rule 520.9(a) (2) (i) (a).*

Very truly yours,

AO'B:tab JOSEPH W. BELLACOSA"

*Both Rule 520.9 and Rule 520.12 are set forth in the Petition for a Writ of Certiorari at pages A8 to A10.

Petitioner, on April 7, 1982, asked for reconsideration. Reconsideration was denied by the Court of Appeals and petitioner was informed by letter of Donald M. Sheraw, dated April 10, 1982 (Pet Appendix, A1):

"COURT OF APPEALS

STATE OF NEW YORK

April 20, 1982

Philip S. Shapiro
47 Peyster Street
Albany, New York 12208

In the Matter of the Application of Philip S. Shapiro for a determination of five years actual practice (22 NYCRR 520.9[a] [2] [i] [d]).

Dear Mr. Shapiro:

I am directed by the Court of Appeals to advise you that your petition for reconsideration in the above captioned proceeding verified April 7, 1982, has been denied.

Very truly yours,

DONALD M. SHERAW
Deputy Clerk"

The petition states that three persons had applied and were admitted to New York State law practice where the

Court accepted a combination of practice in the original State of admission and employment by a New York State agency for the balance of the time necessary. These persons were Robert Reed, David A. Schlissel and William J. Cowan.

Petitioner commenced no proceedings in New York State courts to contest the administrative determination of the Court of Appeals denying him admission to practice. However, petitioner commenced an action in the United States District Court for the Northern District of New York in which Chief Judge Lawrence H. Cooke and Associate Judges Matthew J. Jasen, Domenick L. Gabrielli, Hugh R. Jones, Sol Wachtler, Jacob D. Fuchsberg and Bernard S. Meyer as the Court of Appeals of the State of New York were the defendants. The complaint is dated May 21, 1982 and the relief demanded is as follows:

"RELIEF DEMANDED

"20. Plaintiff prays for judgment

"a. declaring unconstitutional Rule 520.9(a) of the New York Court of Appeals in so far as it precludes legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under its five-year service requirement, and

"b. enjoining defendants from precluding legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under the five-year rule, and

"c. for attorneys' fees, costs and disbursements."

A copy of the complaint is attached to the Appendix of this brief. The State answered the complaint by instrument dated June 14, 1982. A copy of the answer is attached to the Appendix to this brief. Both parties have moved for summary judgment in that action. The motions have not as yet been decided.

Federal Statutes and State Statutes Involved.

28 USC 1257:

"§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of

the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"

New York Civil Practice Law and Rules:

Section 1026:

"§ 1026. Review of determinations by administrative officers of the unified court system

In any action or proceeding brought to review a determination of the chief judge of the court of appeals, of the court of appeals or of the administrative board of the courts, made pursuant to the provisions of article seven-A of the judiciary law or section twenty-eight of article six of the constitution, the only proper party to be named therein shall be the chief administrator of the courts, in his representative capacity. No action or proceeding so instituted shall name the chief judge, the court of appeals or any member thereof, or the administrative board or any member thereof as a party."

"§ 7801. Nature of proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever

in any statue reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court."

Section 7802(a):

"§ 7802. Parties

(a) Definition of 'body or officer'. The expression 'body or officer' includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article"

Section 7803:

"§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

New York Judiciary Law, § 90 (10):

"10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be

divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

ARGUMENT.

I.

Since the Court of Appeals in denying petitioner's application for admission was acting not in a judicial capacity but in an administrative capacity, this application is premature.

Petitioner seeks certiorari in this case to review an administrative determination made by the Court of Appeals, and not from a Court of Appeals judicial decision. The Court of Appeals is not only New York State's highest tribunal (NYS Const, Art VI, §§ 2 and 3), but also performs administrative functions delegated to it by the Legislature. The fact that the Court of Appeals performs administrative functions, in addition to acting as a court, is well established. New York State Constitution, Article

VI, § 28 and Judiciary Law, Article 7-A give the Chief Judge and the Court a substantial role in administration of the State's court system. Civil Practice Law and Rules, § 1026, demonstrates that this administrative role may give rise to litigation in inferior courts, for it provides that the party to be named in such case is the chief administrator of the courts, rather than the Court of Appeals or any of its Judges.

Petitioner seeks certiorari here from another type of administrative determination of the Court of Appeals; that dealing with admission to the Bar. Involved here is New York Code of Rules and Regulations, Title 22, § 520.9(a), which provides for admission in certain cases without examination of the applicant. Such admission is within the discretion of the Appellate Division, when the applicant has practiced for five years in the highest court of original jurisdiction in a State or territory of the United States or the District of Columbia, or in a common law country *where admitted*. Paragraphs "b" and "c" provide for admission after five years of practice under other circumstances not involved here. Paragraph "d" provides that the Court of Appeals may admit a person to practice when it has determined that five years of combined or cumulative service in authorized categories is the equivalent of the practice required under paragraph "a." Section 22-520.12 provides that the Court of Appeals may in its discretion waive any provisions where strict compliance will cause undue hardship.

In the instant case, petitioner's application to the Court of Appeals is based upon three years practice in the State of Maryland and two years service in the State of New York, while working for the Utility Intervention Unit of the State's Consumer Protection Board. It should be

noted that during those two years of service, petitioner was not admitted to practice in New York State nor practicing in Maryland, the State in which he was admitted. The Court of Appeals, in determining that petitioner's service was not the equivalent to practice, issued no order or decision or judgment, but merely informed petitioner by letter from the Clerk of the Court (A2, Pet App).

In a court proceeding, there is a record which can be reviewed. In the instant case, because there was no court proceeding, there is no reviewable record.

To overcome this defect, petitioner sets forth an appendix which consists of copies of a number of letters (some in matters involving other candidates) and an order of the Court made in an application by one Robert D. Reed for admission to the New York State Board. Nowhere in this appendix does it show that the petitioner pursued the judicial remedies available to him in New York law.

Accordingly, the petition for a writ of certiorari should be dismissed because there has been no final judgment or decree rendered by the highest court of this State in which a decision could be made. 28 USC 1257 provides for appeal or certiorari to the United States Supreme Court from *final judgments or decrees rendered by the highest court of the State* in which a decision could be had. Since there was no judicial determination by the Court of Appeals here, neither appeal nor certiorari lie. To the contrary, the Court's administrative determination not to waive its rule was judicially reviewable in New York State court proceedings so that the action, in any event, was not a final judgment rendered by the highest court in which a decision could be had.

In an affidavit by Hugh R. Jones, Associate Judge of the Court of Appeals,* Judge Jones states that New York has a compelling interest in assuring that attorneys who appear before its Bench meet the minimum standards of competence and that this is done generally by the applicant passing the Bar examination. He notes that there is an exception which provides for admission where the applicant has actually practiced law for a period of five years. The Appellate Division is vested with the general responsibility of determining this five-year practice requirement, but where the five-year requirement is accomplished by combining or accumulating services, the Court of Appeals, acting in an administrative and not a judicial capacity, makes the determination.

Petitioner was not without a remedy in New York State. A determination by an administrative body is reviewable by New York State Courts pursuant to New York State CPLR, Art. 78. CPLR § 7802(a) includes a court as one of the bodies whose administrative determination may be reviewed. Before seeking relief from this Court, petitioner should have pursued the available New York State remedies in the form of an Article 78 proceeding. If he had done so, there would have been an adequate record for this Court to have reviewed.

A similar question was considered by this Court in *Fleming v. New York Court of Appeals,* 450 US 902 (1981), which was a case in which the applicant also sought review of the Court of Appeals administrative denial of his admission to the New York State Bar. There, this court

*This affidavit was furnished by Judge Jones in a pending proceeding commenced by the petitioner here in the United States District Court for the Northern District of New York in which he has challenged the Court of Appeals' denial of his admission to the State Bar. A copy of this affidavit is set forth in the appendix to this brief.

treated Fleming's appeal as a petition for certiorari and denied the writ.

In *Morganthau v. Cooke, Chief Judge of the Unified Court System of the State of New York, et al.*, 56 NY2d 24 (1982), the acts of Chief Judge Cooke, as administrator of the New York Court System, were challenged by way of an action for declaratory judgment. The Court of Appeals declared that certain acts undertaken by the Chief Judge exceeded the powers granted him, and found in favor of Morganthau. Thus, the petitioner could have challenged the acts of the Court of Appeals by Article 78 and also by declaratory judgment. If either of these methods had been pursued and the highest court of New York State had made its determination, relief would have been available, which could have been presented to this Court by Petition for Writ of Certiorari.

There have been other cases in which judicial review of the rules governing admission in New York State were considered. In fact, the rule requiring residency of the applicant was struck down in *Gordon v. Committee on Character and Fitness*, 48 NY2d 266 (1980) and in *Matter of Pirie*, 64 AD2d 110 (1st Dept, 1978), where the applicants pursued the legal remedy rather than seeking to avoid it as petitioner has done here. In each of the aforementioned cases, the appellants, instead of seeking to bypass the State's admission proceedings, went forward with their application for admission and pursued their remedy in the New York State courts. Had there been an adverse ruling to them in the State's highest court, they could have sought remedy in the United States Supreme Court.

II.

The alleged instances where admission was granted to other persons under similar circumstances do not estop the Court of Appeals from denying petitioner's application.

Petitioner states that on prior occasions other attorneys with similar practice background were admitted by the Court of Appeals. Even if the cases were identical and if the denial of petitioner's application were considered an order of the Court of Appeals, the Court would not be forced to follow the prior holdings. At most it would be a precedent which the Court could follow or ignore. If a court were obliged to follow precedent, there could be no change or progress in the law. Courts, including this Court, have often refused to follow their earlier decisions. There certainly cannot be an estoppel of the Court because it had previously made a contrary decision in another matter with other parties where the previous matter did not pose a bar of *res judicata* or collateral estoppel.

If the matter is not considered a court decision but an administrative determination by the Court of Appeals, the Court of Appeals could act similarly. Petitioner here would apply the rule of estoppel against the Court of Appeals. A party can only claim estoppel based on a statement made to him by the one being estopped. 31 CJS *Estoppel*, § 69, page 416 considered this, saying:

> "Estoppel cannot be based on statements to third parties which were not intended to be communicated to the party claiming the benefit thereof."

The decisions which petitioner would base his estoppel on were never communicated to him by the Court of Appeals.

As a matter of fact, New York State Judiciary Law, § 90(10) provides in part that:

> "10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential."

Thus, petitioner would have the Court estopped by matters which it could not have communicated to him because they were confidential.

The Court of Appeals is a public agency. Under New York law, it is well established that estoppel is not available against a public agency (*Public Improvements, Inc. v. Board of Education of the City of New York*, 56 NY2d ____ [decided June 8, 1982], see, also, *Matter of Hamptons Hosp. & Med. Center v. Moore*, 52 NY2d 88 [1981]; *Matter of Bloomberg-Dubin v. Board of Educ. of City of New York, et al.*, 82 AD2d 854, affd 56 NY2d 555 [1982]). The federal rule is fundamentally the same (see *Schweiker v. Hansen*, 450 US 785, 789-790 [1981] and *United States Immigration and Naturalization Services v. Hibi*, 414 US 5, 8 [1973]). Thus, whether the past determinations set up by petitioner in his appendix are administrative decisions or judicial determinations, they do not bind the Court of Appeals as to future acts and they do not create any right in the petitioner.

III.

The application for certiorari is late.

Mr. Shapiro's petition for admission was denied by the Court of Appeals by letter dated March 23, 1982 (Applt App, A2). If the action challenged were a judicial determination, then this letter would have been the decision. The petitioner would have then had 90 days in which to apply for certiorari. His 90 days would have expired on June 21, 1982. His petition for certiorari is dated July 13, 1982.

Petitioner, however, requested reconsideration of the denial of his application. He was advised by the Clerk of the Court of Appeals on April 20, 1982 that reconsideration had been denied (Applt App, A1).

There is no provision or principle in New York law which would entitle petitioner to ask for reconsideration of the original determination by the Court of Appeals. Since there is no right to apply for reconsideration of an application for admission, such as petitioner made, the making of such an application would not extend petitioner's time to act. If certiorari had been available to petitioner, the application for reconsideration would not extend his time to apply for it (*FTC v. Minneapolis-Honeywell Regulator Co.*, 344 US 206, 210-12 [1952]; *King, Governor of Massachusetts, et al. v. Preterm, Inc., et al.*, 449 US 901 [1980]). It should be noted that the effect of applying this time limitation is procedural only and does not deprive petitioner of pressing his claim should he be so advised. In fact, he has sought to do this by commencing an action in the United States District Court for the Northern District.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated: Albany, New York
July 26, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of
New York
Attorney for Respondents

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

JEREMIAH JOCHNOWITZ
Assistant Solicitor General

BETSY BRODER
Deputy Assistant Attorney General
Of Counsel

APPENDIX.

Complaint.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

PHILIP S. SHAPIRO,

Plaintiff,

against

CHIEF JUDGE LAWRENCE H. COOKE and ASSOCIATE JUDGES MATTHEW J. JASEN, DOMENICK L. GABRIELLI, HUGH R. JONES, SOL WACHTLER, JACOB D. FUCHSBERG and BERNARD S. MEYER as the Court of Appeals of the State of New York,

Defendants.

Case No. 82-CV-457

JURISDICTION

1. This action for declaratory and injunctive relief arises directly under Article I, Section 8 (interstate commerce), Article IV, Section 2 (Privileges and Immunities of Citizens), and Amendment XIV, Section 1 (privileges or

immunities and equal protection) of the Constitution of the United States and under 42 USC §1983. This complaint is filed and the jurisdiction of this Court is invoked under 28 USC §§1331 and 1343.

PARTIES

2. Plaintiff is a citizen of the United States and the State of New York and a resident of the City and County of Albany, New York in the Northern District of New York.

3. The individual defendants are the Chief Judge and the Associate Judges who now constitute the Court of Appeals of the State of New York under Article VI, Section 2 of the Constitution of the State of New York. Each defendant has an office and the Court conducts its sessions in the City and County of Albany, New York in the Northern District of New York.

SUBJECT MATTER OF CLAIMS

4. In the design of the procedures for admission to practice law in New York, the determination of general and legal educational qualification of applicants has traditionally been kept separate and apart from the co-ordinate determination as to character and general fitness. Responsibility for the former has been retained and is exercised exclusively by the New York Court of Appeals.

5. Determinations of general and legal educational qualifications of applicants for admission to the bar are made by and under the "Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law" which have been adopted by the Court of Appeals pursuant to Section 53 of the New York Judiciary Law and

are published as Part 520, Title 22, Judiciary, in the Official Compilation of Codes, Rules and Regulations of the State of New York.

6. The subject matter of this action is the Rule governing admission of applicants without examination which is section 520.9(a) of said Rules and provides:

> 520.9 Admission without examination. (a) General. In its discretion the Appellate Division may admit to practice without examination an applicant who:
>
> (1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia or has been admitted to practice as an attorney and counselor-at-law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; and
>
> (2) (i) while admitted to practice as specified in paragraph (1) of this subdivision, has actually practiced for a period of at least five years:
>
> (a) in its highest law court of highest court of original jurisdiction in the state or territory of the United States in the District of Columbia or in the common law country where admitted; or
>
> (b) In Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or for the performance of the duties thereof; or

(c) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States, the District of Columbia or in the common law country where admitted; or

(d) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (a) of this subparagraph; or

(ii) is a graduate of and has received a first degree in law from an approved law school as defined in section 520.3(b) of this Part and, for a period of at least five years immediately preceding the application for admission without examination, has been employed in this State or in any other state or territory of the United States or in the District of Columbia as a full-time member of the law faculty teaching in a law school or schools on the approved list of the American Bar Association and has attained the rank of professor or associate professor; and

(3) has had the substantial equivalent of the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such

other state, territory, district or common law country, or at the time of application for admission under this section; and

(4) is over 26 years of age.

BASES OF CLAIMS

7. In determining combinations or cumulations of service under the five-year requirement of the Rule, the Court of Appeals

(a) precludes legal service for the State of New York from consideration although the same and lesser legal service is accepted if it is performed in and for the State of admission or as an assistant counsel to a corporation in the State of admission,

(b) accepts federal military or civilian service which requires admission to the bar for the appointment thereto or for the performance of the duties thereof regardless of its nature and location while service in and for the State of New York in a position which requires admission to the bar for the appointment thereto and for the performance of its duties is precluded from consideration, and

(c) accepts any teaching service as a full-time associate professor in an approved law school for five years while practice for an agency of the State of New York in a position requiring admission to the bar is precluded from consideration.

CLAIMS

8. In the particulars set forth in the preceding paragraph 7 of this complaint, Section 520.9(a) of the

(a) discriminates against interstate commerce,

(b) denies to citizens of New York privileges and immunities of citizens in other States,

(c) abridges the privileges or immunities of citizens of the United States, and

(d) denies persons within New York the equal protection of the laws.

9. The citizens and persons to whom the preceding paragraph 8 refers as being affected are attorneys employed in and by the State of New York who are admitted to the bar of another State and have "actually practiced" less than five years in such other State.

10. The denials and abridgements alleged in the preceding paragraph 8 are made under color of New York State law and regulations.

PLAINTIFF'S STANDING

11. Plaintiff was born in Baltimore, Maryland on May 11, 1951 and, without interruption, was a resident and citizen of Maryland until January 1980. Since January 1980, plaintiff has been and is now a resident and citizen of New York.

12. Plaintiff graduated from the University of Maryland at College Park in December 1972 and from the University of Maryland School of Law in June 1976.

13. In December 1976, plaintiff was admitted to practice in the State of Maryland after written examination in July 1976. In February 1977, plaintiff was admitted to practice in the State of Florida after written examination in October 1976. The multi-State portion was not required to be taken in Florida where plaintiff was credited with passing such examination as part of the written examination in Maryland. In December 1977, plaintiff was admitted to practice in the State of California after written examination in July 1977.

14. Plaintiff is also admitted to practice in the United States Supreme Court, the District of Columbia Court of Appeals, U.S. Courts of Appeals for the D.C., 3rd, 4th, 5th, 8th and 9th Circuits, U.S. District Court for the District of Maryland, U.S. Court of Claims and U.S. Tax Court.

15. In January 1975, plaintiff was employed as a Clerk by the Office of People's Counsel of Maryland and was promoted to Assistant People's Counsel upon his admission to the bar on December 30, 1976 and continued to serve as such to January 1980.

16. In September 1979, plaintiff was recruited as an attorney by the New York State Consumer Protection Board for the position of Intervenor Attorney in the Board's Utility Intervention Unit. Plaintiff was appointed to such position effective January 14, 1980 and has since practiced and continues to practice public utilities law in such position.

17. As an Intervenor Attorney for the Utility Intervention Unit of the New York State Consumer Protection Board, plaintiff's practice is essentially identical to his

practice as a Maryland Assistant People's Counsel, i.e., appearing on behalf of utility consumers before State and Federal utility regulatory commissions, prosecuting and defending judicial causes relating to utility matters and acting as legislative counsel to the respective State agencies.

18. As an Intervenor Attorney for the Utility Intervention Unit of the New York State Consumer Protection Board, plaintiff has represented consumers before the New York Public Service Commission, Federal Energy Regulatory Commission, Federal Communications Commission, U.S. Court of Appeals for the D.C. Circuit and, upon admission *pro hac vice,* in the New York Supreme Court, Albany County, the Appellate Division, Third Department and the New York Court of Appeals.

19. By letter dated March 23, 1982, the Court of Appeals advised plaintiff of his denial of his application for admission to the bar without examination and noted that "Employment in New York State by the Consumer Protection Board as an Intervenor Attorney is not actual practice in contemplation of Rule 520.9(a) (2) (i) (a)." By letter dated April 20, 1982, the Court of Appeals advised plaintiff of its denial of his petition for reconsideration.

RELIEF DEMANDED

20. Plaintiff prays for judgment

a. declaring unconstitutional Rule 520.9(a) of the New York Court of Appeals in so far as it precludes legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under its five-year service requirement, and

b. enjoining defendants from precluding legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under the five-year rule, and

c. for attorneys' fees, costs and disbursements.

Dated: Albany, New York
May 21, 1982

McGINN AND BROWN, P.C.
By: /s/ ARTHUR F. McGINN, Jr.
Attorney for Plaintiff
41 State Street
Albany, New York 12207
Telephone: (518) 436-7684

Answer.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

PHILIP S. SHAPIRO,

Plaintiff,

against

CHIEF JUDGE LAWRENCE H. COOKE and ASSOCIATE JUDGES MATTHEW J. JASEN, DOMENICK L. GABRIELLI, HUGH R. JONES, SOL WACHTLER, JACOB D. FUCHSBERG and BERNARD S. MEYER as the Court of Appeals of the State of New York,

Defendants.

82-CV-487
(Judge Miner)

Defendants, by their attorney, Robert Abrams, Attorney General of the State of New York, answering the complaint herein:

FIRST: Admit the allegations in paragraph 3.

SECOND: Deny the allegations in paragraphs 8, 9 and 10.

THIRD: Deny knowledge or information sufficient to form a belief as to the allegations in paragraphs 2, 11, 12, 13, 14, 15, 16, 17 and 18.

FOURTH: The allegations in paragraphs 1, 4, 5, 6 and 7 set forth conclusions of law which do not require a response. To the extent that the allegations in these paragraphs are factual in nature, they are denied.

FIFTH: Deny the allegations in paragraph 19, and respectfully refer the Court to the letters of March 23, 1982 and April 20, 1982, which are the best evidence of their contents.

AS AND FOR A FIRST DEFENSE:

SIXTH: The plaintiff has failed to seek review of the administrative determination of which he complains by way of an available state judicial remedy under Article 78 of the New York Civil Practice Law and Rules, and this Court therefore lacks jurisdiction over the subject matter of this action.

AS AND FOR A SECOND DEFENSE:

SEVENTH: The Court should decline to exercise jurisdiction over the subject matter of this action under the doctrine of abstention.

AS AND FOR A THIRD DEFENSE:

EIGHTH: The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the defendants respectfully request that the complaint herein be dismissed, and that they be awarded such further and different relief as the Court deems just, proper, and equitable.

Dated: June 14, 1982

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224
By: _____
DAVID B. ROBERTS
Assistant Attorney General

Affidavit of Hon. Hugh R. Jones.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

PHILIP S. SHAPIRO,

Plaintiff,

against

CHIEF JUDGE LAWRENCE H. COOKE and ASSOCIATE JUDGES MATTHEW J. JASEN, DOMENICK L. GABRIELLI, HUGH R. JONES, SOL WACHTLER, JACOB D. FUCHSBERG and BERNARD S. MEYER as the Court of Appeals of the State of New York,

Defendants.

82-CV-487
(Judge Miner)

State of New York,
County of Oneida, ss:

HUGH R. JONES, being duly sworn, deposes and says:

1. I am an Associate Judge of the New York State Court of Appeals, and am named as a defendant in the above-referenced action. I make this affidavit in opposition to the plaintiff's motion for summary judgment, and

in support of the defendants' cross-motion for summary judgment.

2. I have been designated by the Court to act in an administrative capacity in which I carry primary responsibility for the Court's determinations on applications for admission to the New York State bar without examination, pursuant to 22 NYCRR § 520.9(a) (2) (i) (d).

3. The Court has a compelling interest in assuring that attorneys who appear before the bench in this State meet minimum standards of competence. As a general rule this interest is safeguarded by requiring that applicants to the bar pass the bar examination. In addition, certain applicants may be admitted without taking the examination, if they possess experience which would reasonably assure that they meet minimum standards of competence.

4. Section 520.9 sets forth the requirements for admission to the bar without examination, where the applicant has actually practiced law for a period of at least five years, or where the applicant has served for at least five years as a professor or associate professor at an approved law school. A copy of Section 520.9 is annexed hereto and marked as Exhibit "A".

5. Under the procedural format set forth in Section 520.9, the Appellate Division is vested with general responsibility to determine whether an applicant should be admitted to practice without examination. The Court of Appeals becomes involved in this process only when an applicant seeks to satisfy the five-year practice requirement by combining or cumulating terms of service from different categories of practice set forth in Section 520.9 (a) (2) (i) (a)-(c).

6. In passing upon applications pursuant to Section 520.9(a) (2) (i) (d), the Court of Appeals acts in an administrative, not judicial capacity. A determination by the Court under this regulation is not a judicial decision, but an administrative one which is subject to review under Article 78 of the Civil Practice Law and Rules.

7. On March 8, 1982, the plaintiff initially applied to the Court of Appeals for admission pursuant to this section. A copy of his application is annexed hereto and marked as Exhibit "B".

8. By letter dated March 23, 1982, the Clerk for the Court of Appeals notified the plaintiff that his application for a waiver of the bar examination was denied. A copy of this letter is annexed hereto and marked as Exhibit "C".

9. On April 7, 1982 the plaintiff submitted a petition for reargument or reconsideration of the Court's denial of his application. A copy is annexed hereto and marked as Exhibit "D".

10. By letter dated April 20, 1982, the Deputy Clerk informed the plaintiff that the Court had denied his motion for reconsideration. A copy is annexed hereto and marked as Exhibit "E".

11. The materials submitted by the plaintiff in support of his petition indicate that he was admitted to the practice of law in Maryland on December 30, 1976, and served as an Assistant People's Counsel in that State. The petition indicates that from January 14, 1980 to the time of his application, the plaintiff was employed as an intervenor attorney for the New York State Consumer Protection Board. The plaintiff requested that the Court of Appeals

determine that a combination or cumulation of his Maryland employment with that in New York constituted the equivalent of five years of actual practice of law.

12. The Court of Appeals rejected the plaintiff's application on the ground that his two years of employment in New York could not be credited as actual practice of law. If, in fact, the plaintiff "practiced law" in New York during this period, he was engaged in the unauthorized practice of law without a license.

13. With two exceptions, Section 520.9 requires that the applicant possess at least five years of actual experience practicing law in a state, territory, or common law country in which the applicant has been admitted to practice. This general requirement is premised on the reasonable presumption that an attorney may be engaged in "actual practice" only in a jurisdiction in which he or she has been admitted to the bar.

14. The first of the two exceptions to this general requirement is set forth in Section 520.9(a) (2) (i) (b), which recognizes that Federal military or civilian legal service in a position which requires admission to the bar will be "counted" even where the applicant may have been admitted in a State other than that in which his or her Federal Service was rendered.

15. The second exception to the general rule articulated in paragraph 14 is set forth in Section 520.9(a) (2) (ii), which permits an attorney to be admitted to the New York bar without examination if the applicant has been admitted to the bar of another state, and has been employed for at least five years immediately preceding the application as a professor or associate professor at an approved law school.

16. Section 520.9 is not applied by the Court in order to erect protectionist barriers calculated to discourage out-of-state attorneys from applying for admission to the New York bar. The regulation, as applied, promotes interstate commerce by providing an expeditious mechanism for qualified out-of-state attorneys to be admitted to the bar without examination, while preserving the state's compelling interest in maintaining minimum levels of professional competence of members of the bar.

HUGH R. JONES

Sworn to before me this
23rd day of July, 1982.
ROBERT J. SHERIDAN
Notary Public in the State of New York
Appointed in Oneida County
My Commission Expires March 30, 1984